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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 08/777,958
Filing Date: December 24, 1996
Appellant(s): HAMILTON ET AL.

Charles Hieken
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/9/09 appealing from the Office action mailed 7/22/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Appeal No. 94-2403 applied for parent application 07/871,926.

Appeal No. 2000-1557 applied for current application.

Appeal No. 2007-3091 applied for current application.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1, 3-6 and 8-10.

Claims 2 and 7 have been canceled.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

The correct status for item #3 should state: claims 1, 3-6 and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hutchins in view of Virva.

The non-final office action mailed on 7/22/08 did not have a correct heading for paragraph #10. The correct heading for paragraph #10 should include claims 3 and 8 plus the previously identified claims 1, 4-6, 9 and 10. On p. 11 of the non-final office action, claims 3 and 8 are being analyzed and rejected.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,394,478	HATHAWAY et al.	2-1995
4,572,326	HUTCHINS	2-1986
4,164,988	VIRVA	8-1979

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

9.1 Claims 1, 3-6 and 8-10 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The claimed limitation in the instant application "said at least one speaker is disposed in a rearward section of the trunk occupying negligible useful trunk volume to

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cause a smaller decrease in calculated trunk volume than would occur with said at least one speaker mounted in said rear deck” is specified in lines 8-10 of claim 1. The the original specification (which was filed on 4/21/92) of the current application discloses that “the speakers mounted in the rear deck reduce the calculated trunk volume of the vehicle” on lines 16-17 of p. 1, and “the enclosure in the corner of the trunk results in a smaller decrease in calculated useful trunk volume than do speakers mounted in the rear deck” on lines 22-25 of p. 2. Accordingly, the original specification (which was filed on 4/21/92) of the current application and the original drawing (which was filed on 4/21/92) of the current application only disclose how to compare the calculated useful trunk volume between speakers (plural) being mounted on the rear deck and the speaker being disposed in the trunk clear of the rear deck above the trunk floor and outside of the spare tire compartment, but fails to disclose how to compare the calculated useful trunk volume with one speaker (singular) being mounted in the rear deck and the speaker being disposed in the trunk clear of the rear deck above the trunk floor and outside of the spare tire compartment. Therefore, claim 1 introduces new matter which was not described in the specification as originally filed.

9.2 Claims 1, 4-6, 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hathaway et al. (hereafter Hathaway) (US005394478A).

Regarding claim 1, Hathaway discloses an audio speaker system for a vehicle having a passenger compartment (8), a trunk having a trunk floor (shown Fig. 5), a dividing portion and a rear deck (col. 5, line 2; a sedan inherently includes a dividing

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portion and a rear deck), said dividing portion and said rear deck dividing the trunk and the passenger compartment, said audio speaker system comprising at least one low frequency speaker (4; col. 1, lines 9-10) disposed within the trunk of the vehicle such that said at least one speaker (4) is clear of the rear deck (as shown in Fig. 5, the speaker is not mounted on the deck) above the trunk floor;

wherein said at least one speaker occupying negligible useful trunk volume ("without significant reduction of storage space" as stated in col. 5, lines 12-13).

The limitation "occupying negligible useful trunk volume to cause a smaller decrease in calculated trunk volume than would occur with said at least one speaker mounted in said rear deck" is met by Hathaway's speaker. The term "out-of-the-way corner of the trunk" in Hathaway implies that the corner is an odd shaped corner or a secluded corner of the trunk that it is not convenient or big enough for storage purpose. Based on applicant's disclosure specified from line 32 of p. 2 to line 10 of p. 3 and in view of Figs. 5-7, when car manufacturers calculate the trunk's volume, the useful trunk volume would not include the volume at the "out-of-the-way corner of the trunk". Hathaway also states that the placement of the speaker does not significantly reduce the storage space (col. 5, lines 12-13). So, Hathaway's speaker only causes a small percentage of the useful trunk volume decrement. As shown in Fig. 7 of applicant's disclosure, mounting the speaker to the deck would significantly reduce the useful trunk volume available due to the height and the diameter of the speaker, so a suitcase or a big box having substantial dimension cannot be placed all the way inside the trunk to touch the dividing portion of the car under the rear deck. Therefore, based on

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applicant's disclosure, by placing the speaker as disclosed in Fig. 5 in an out-of-the-way corner of the trunk without significant reduction of storage space (lines 12-13 of col. 5), Hathaway discloses the limitation "said least one speaker ... occupying negligible useful trunk volume to cause a smaller decrease in calculated trunk volume than would occur with said at least one speaker mounted in said rear deck".

Although Hathaway fails to disclose that the sedan includes a spare tire compartment; however, Examiner takes Official Notice that a sedan having a spare tire compartment is a well known fact to the general public. Thus, it would have been obvious to one of ordinary skill in the art at the time of the invention was made that Hathaway's vehicle would have had a spare tire compartment, so a spare tire could be stored for emergency purpose.

Furthermore, it is well known to one of ordinary skill in the art that a spare tire could not be stored at an out-of-the-way corner of the trunk due to its circular shape. So the "out-of-the-way corner of the trunk" in Hathaway would not able to store a spare tire. Therefore, one skilled in the art could reasonably expected that the speaker in Hathaway stored at an "out-of-the-way corner of the trunk" is being stored outside of a spare tire compartment.

Hathaway fails to show that the speaker is being disposed at the trunk rear (based on disclosure, the trunk rear is closer to the rear of the vehicle than the dividing portion) and in the rearward section of the trunk. Hathaway broadly teaches that one has to consider the storage space in the trunk when determining the speaker placement, so the speaker would not significantly reduce the useful trunk volume (col. 5,

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lines 12-13). Hathaway implies that the location of the low frequency speaker is a matter of trunk space management. Accordingly, one of ordinary skill in the art would recognize the limited number of locations in the trunk, that would be considered negligible space, would be spaced behind panels, rear corners of the trunk, or space above the wheels (evidenced by Figs. 5-7 of appellant application, which shows what manufacturers consider negligible space). This coupled with the suggestion of Hathaway; one would locate the speaker and chamber in the space behind the panels, rear corners of the trunk or in the space above the wheel wells. Hence it would have been obvious to place the system at the rear of the trunk for it would have been one of the obvious "out-of-way corner of the trunk" that would not result in "significant reduction of storage space".

Regarding claim 4, as shown in Fig. 5, the speaker in Hathaway is mounted in an enclosure.

Regarding claims 6 and 9, as shown in Fig. 5 of Hathaway, the deck is free of speaker holes. Furthermore, a hole (next to 3) is for mounting a pipe (2), not for mounting the speaker, so Hathaway also shows the claimed limitation that the rear deck is free of a speaker hole.

Regarding claims 5 and 10, the claimed "undesired hole between 60-80 Hz" in the front seat frequency response of the speaker and "undesired peak in the rear seat frequency response of said vehicle between 80-100 Hz" are the frequency responses by mounting speakers to the rear deck. See lines 19-25 of p. 3 of applicant's disclosure. It is also noted that the term "undesired" is a relative term. So it is subject to an individual

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to determine how deep the hole is to be considered as an undesired hole, and it is also subject to an individual to determine as how high the peak is to be considered as an undesired peak. Therefore, the response produced by Hathaway's speaker would meet the claimed frequency response because (1) Hathaway's speaker is not mounted on the deck; and (2) an individual could subjectively consider the response produced by Hathaway's speaker as free of an undesired peak in the rear seat between 80-100 Hz and free of an undesired hole between 60-80 Hz in the front seat response.

Furthermore, Hathaway shows the actual frequency response in the passenger compartment in Fig. 6 without "undesired peak" between 80-100 Hz and "undesired Hole" between 60-80 Hz (the terms "undesired peak" and "undesired peak" are subjective term depending on the classification of an individual). Although Hathaway fails to provide separate responses at the front seat and back seat, one skilled in the art would have expected that the front seat response or the back seat would not deviate significantly from the response as shown in Fig. 6. Since Hathaway's speaker is not directly mounted to the deck, one skilled in the art would have expected that Hathaway's speaker would produce the frequency response meet the claimed limitation "free of an undesired peak in the rear seat frequency response of said vehicle between 80-100 Hz and free of an undesired hole between 60-80 Hz in the front seat frequency response of said vehicle" depending on the designer's subjective thresholds on how deep the hole is to be considered as an undesired hole, and high the peak is to be considered as an undesired peak.

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9.3 Claim 1, 3-6, and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hutchins (US 4,572,326) in view of Virva (US 4,164,988).

Regarding claim 1, Hutchins discloses an audio speaker system for a vehicle having a passenger compartment (col. 2, line 26), a trunk(16) having a trunk floor (although not shown, it is inherently included), a dividing portion (col. 2, lines 24-26) and a rear deck (18), said dividing portion and said rear deck dividing the trunk and the passenger compartment, said audio speaker system comprising at least one low frequency speaker (42a or 42b) disposed within the trunk of the vehicle at the trunk rear (see Fig. 1) in a location spaced from the passenger compartment by the portion of the trunk extending to the front of the vehicle (see Fig. 1) such that said at least one speaker (4) is above the trunk floor and outside of the spare tire compartment.

Hutchins fails to show that the speaker is disposed in rearward section of the trunk occupying negligible useful trunk volume to cause a smaller decrease in calculated trunk volume than would occur with said at least one speaker mounted in said rear deck. In the same field of endeavor, Virva suggests placing a low frequency speaker (col. 3, line 17) with enhanced bass response in the trunk, so not to interfere with the storage handling capacity of the trunk (col. 6, lines 6-10). Based on applicant's disclosure specified from line 32 of p. 2 to line 10 of p. 3 and in view of Figs. 5-7, when car manufacturers calculate the trunk's volume, the useful trunk volume does not include the volume occupied by the speakers mounted to the rear deck and the volume surround the speakers (see Fig. 7). So one skilled in the art would have expected that Hutchins' deck-mounted speakers occupy significant amount of useful trunk volume due

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to the height and diameter of the speakers enclosed in the enclosures as shown in Fig.

1. On the other hand, Virva suggests placing the speaker at a location inside the trunk not on the deck, so the user can still maintain the storage volume. So Virva implies that the speaker would be located at any location in the trunk that would occupy negligible useful trunk volume for storage. So, considering the amount of the space occupied by the speaker if it is being placed in the middle of the trunk, mounting the speaker near one of corners or one of sides in the trunk that a general parcel or luggage cannot be placed would seem to be one of several reasonable choices. Furthermore, one generally would not be able to store a big parcel or luggage at the corner of the trunk any way, so using the rear corner or rear side of the trunk (read on the claimed "trunk rear" and "rearward section of the trunk) for mounting speaker would not interfere with the normal trunk storage capacity. Thus, one of ordinary skill in the art at the time of the invention was made, with both references before him/her, would have been motivated to test and try different speaker mounting positions, including locations in the trunk rear, in order to find a best location that occupying negligible useful trunk volume in order to enhance the low frequency response and maintain the storage capacity.

Regarding claims 3 and 8, Hutchins and Virva fail to show that the at least one speaker is disposed in a rear trunk corner at the rear of the vehicle. Virva broadly teaches that the designer has to consider the amount of the useful trunk volume left when placing the speaker and the flexible tube in the trunk (col. 6, lines 7-10). So, considering the amount of the space occupied by the speaker if it is being placing in the middle of the trunk, placing the speaker at the corner would seem to be one of several

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reasonable choices. Furthermore, one generally would not be able to store a big parcel or luggage at the corner of the trunk any way, so using the corner of the trunk for mounting speaker would not interfere with the normal trunk storage capacity.

Virva also teaches to make the speaker tube flexible to fit into any space in the trunk (col. 5, line 66+). Therefore, Virva does not limit the location of the speaker to be in the front or in the rear of the trunk at the rear of the vehicle. Accordingly, one of ordinary skill in the art at the time of the invention was made would have been motivated, with both references before him/her, to try and test different speaker mounting locations within the trunk, including the corner at the rear of the vehicle in order to find a best location for placing the enhanced bass response speaker without interfering the storage capacity.

Furthermore, it has been held to be within the general skill of a worker in the art to rearrange the location of a part as a matter of design choice. *In re Japikse*, 86 USPQ 70.

Regarding claim 4, as shown in Fig. 5, the speaker in Virva is mounted in an enclosure.

Regarding claims 6 and 9, by modifying Hutchins in view of Virva, the rear deck is free of speaker holes.

Regarding claims 5 and 10, the claimed “undesired hole between 60-80 Hz” in the front seat frequency response of the speaker and “undesired peak in the rear seat frequency response of said vehicle between 80-100 Hz” are the frequency responses by mounting speakers to the rear deck. See lines 19-25 of p. 3 of applicant’s disclosure. It

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is also noted that the term "undesired" is a relative term. So it is subject to an individual to determine how deep the hole is to be considered as an undesired hole, and it is also subject to an individual to determine as how high the peak is to be considered as an undesired peak. Therefore, Virva's speaker would produce the claimed frequency response because (1) Virva's speaker is not mounted on the deck; and (2) an individual could subjectively consider the response produced by Virva's speaker as free of an undesired peak in the rear seat between 80-100 Hz and free of an undesired hole between 60-80 Hz in the front seat response.

(10) Response to Argument

I. THIS APPLICATION HAS BEEN IDENTIFIED AS A "CONTINUING" APPLICATION, NOT "A CONTINUATION OR DIVISIONAL APPLICATION" OF THE PRIOR-FILED APPLICATION.

Appellant's brief presents arguments in this heading relating to the status of current application related to the previous application No. 07/871,926. This issue relates to petitionable subject matter under 37 CFR 1.181 and not to appealable subject matter. See MPEP § 1002 and § 1201.

II. THE LANGUAGE IN THE PRIOR DECISION OF THE BOARD OF PATENT APPEALS AND INTERFERENCES FINDING THAT THIS APPLICATION MEETS THE ENABLING REQUIREMENTS OF 35 U.S.C. §112, FIRST PARAGRAPH ALSO SUPPORTS A CONCLUSION THAT THE WRITTEN DESCRIPTION REQUIREMENTS HAVE BEEN MET.

Examiner would like to point out that 112, 1st paragraph rejection presented above and in the non-final office action mailed 7/22/08 is different from the previous 112, 1st paragraph rejection (appellant cited it on p. 4 of the appeal brief). The previous 112, 1st paragraph rejection raised the issue of enablement regarding the size and shape of the low frequency speaker necessary to be employed in the claims. The current 112, 1st paragraph rejection raise the issue of whether the claims comply with written description requirement regarding comparing the calculated volume occupied by mounting one speaker on the rear deck as specified in the claims versus calculating volume occupied by mounting plural speakers on the rear deck as disclosed in the specification. Appellant's argument fails to directly rebut examiner's rejection in view of the new 112, 1st paragraph rejection.

III. THE HATHAWAY PATENT IS NO MORE PERTINENT THAN THE PRIOR ART CONSIDERED BY THE BOARD IN REVERSING THE LAST FINAL REJECTION.

On p. 7 of the brief, appellant stated that Fig. 5 of Hathaway clearly shows the loudspeaker at the front of the trunk and that the acoustic chamber is half the height of the trunk. By analyzing and making the assumption of the speaker size, appellant fails to take into consideration of what is being defined as "occupying negligible trunk volume" by appellant's disclosure and what is being taught in Hathaway as a whole. On lines 8-10 of p. 3 of the specification, appellant defines that negligible useful trunk volume means that the enclosure portion in the useful trunk volume is a small

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percentage of the useful trunk volume. First of all, Hathaway clearly states that the speaker is being placed “in an out-of-way corner of the trunk” (col. 5, lines 11-12). Hathaway further adds the statement “without significant reduction of storage space” (col. 5, lines 12-13). So, Hathaway’s speaker only causes a small percentage of the useful trunk volume decrement. This meets appellant’s definition. Secondly, on lines 5-7 of p. 3 of the appellant’s specification and Fig. 7, mounting the speakers on the rear deck would significantly reduce the useful trunk volume available due to the height and the diameter of the speaker. As shown in Fig. 5, Hathaway teaches that the speaker is not mounted on the rear deck, and the speaker is placed in an out-of-way corner of the trunk. Therefore, Hathaway meets the claimed limitation “occupying negligible trunk volume”.

On p. 7 of the brief, appellant stated that Fig. 5 of Hathaway clearly shows the loudspeaker at the front of the trunk and that the acoustic chamber is half the height of the trunk. However, this ignores the suggestion in Hathaway of “convenient placement of the system in an out-of-the-way corner of the trunk, without significant reduction of storage space” and “As mentioned above, the size of such a system can be made very small. Typical systems can be under one cubic foot, overall” (from col. 4, line 1 to col. 5, line 1) . At col. 3, lines 50-54 of Hathaway, the Helmholtz resonator is taught as being typically $\frac{1}{2}$ a cubic foot which teaches that the speaker 4 and chamber 1 as a combination is therefore typically $\frac{1}{2}$ cubic foot. One of ordinary skill in the art would recognize the limited number of locations in the trunk, that would be considered negligible space, would be space behind panels, rear corners of the trunk, or space

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above the wheels (evidenced by Figs. 5-7 of appellant application, which shows what manufacturers consider negligible space). This coupled with the suggestion of Hathaway, one would locate the speaker and the chamber in the space behind the panels, rear corners of the trunk or in the space above the wheel wells. Hence it would have been obvious to place the system at the rear of the trunk for it would have been one of the obvious "out-of-way corner of the trunk" that would not result in "significant reduction of storage space".

IV. THE HUTCHINS PRIMARY REFERENCE DISCLOSING SPEAKERS DEPENDING FROM THE REAR DECK AND VIRVA SECONDARY REFERENCE DISCLOSING A BIG WOOFER DO NOT MAKE OBVIOUS THE SUBJECT MATTER AS A WHOLE OF THE CLAIMED INVENTION.

In response to appellant's argument on p. 10 of the brief that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

On lines 1-2 of p. 12 of the brief, appellant argued that nothing in Virva remotely could be combined with anything in Hutchins, the primary reference, to meet any claim

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is this application. Examiner vehemently disagrees. On col. 6, lines 8-10, Virva explicitly, directly and clearly teaches the benefit of mounting the speaker in the trunk of a vehicle. Hutchins, on the other hand, discloses mounting the speakers on the rear deck. One skilled in the art, with Hutchins and Virva being placed in front of him/her, would have been motivated to place the speaker in the trunk instead of mounting on the rear deck in order to enhance the low frequency response and maintain the trunk's storage capacity.

Hutchins discloses in the abstract that a structure located in the trunk is being used to enhance the low frequency response. Virva's speaker is able to enhance the low frequency response (col. 3, lines 16-17) without having any hole on the rear deck. Therefore, the proposed combination not only would not destroy Hutchins for its intended purpose, it would provide a better solution to have enhanced low frequency sound effect without having hole on the rear deck.

Appellant stated on p. 12 of the brief that the reliance on *In re Japikse*, 85 U.S.P.Q. 70 (C.C.P.A. 1950) is inapposite. Examiner disagrees. The rejection for the only independent claim, claim 1, does not rely on cited case law. This case law is applied to the rejection for dependent claims 3 and 8. The limitation in claims 3 and 8 states that "said at least one speaker is disposed in the rear trunk corner at the rear of said vehicle". On lines 17-18 of p. 2 of the specification, appellant states that "placement of the speaker enclosure 9 is preferably in a corner of the vehicle trunk 7". Noted the word "preferably" in that statement. Furthermore, on lines 29-31 of the specification, appellant states that "although the enclosure is shown mounted in the left

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corner of the trunk, any rear remote area of the trunk would be acceptable for the purposes of the invention". Noted the phrase "any remote area of the trunk". In view of appellant's disclosure, the "rear trunk corner at the rear of the vehicle" as claimed in claims 3 and 8 is just one preferred location. There is no invention involved by choosing a preferred location to place the speaker based on personal preference or designer's choice. Virva clearly teaches that the speaker can be placed at any location that "not to interfere with the storage capacity of his automobile's trunk" (col. 6, lines 9-10). So, one skilled in the art would have been motivated to try and test different locations in the trunk, including the corner at the rear of the vehicle, in order to find a best location for placing the enhanced bass response speaker without interfering the storage capacity.

Therefore, the reliance of *In re Japikse*, 85 U.S.P.Q. 70 (C.C.P.A. 1950) is appropriate, suitable and pertinent.

Appellant indicated on the heading that Virva discloses a big woofer. It appears that appellant ignored what is being taught in Virva by making his/her own assumption on the size of the woofer. On col. 6, lines 16-17, Virva teaches that the "loudspeaker-air column system combination of such small size". Therefore, Virva does not disclose big woofer as alleged by appellant.

V. THAT THE PTO SENT AN E-MAIL TO COMPETITORS OF THE APPLICATION OWNER SEEKING PRIOR ART IN AN EFFORT TO BAR THE GRANT OF A PATENT TO APPLICATION OWNER AND WAS UNABLE TO OBTAIN A

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SINGLE RELEVANT REFERENCE IS FURTHER EVIDENCE THAT THE CLAIMS MEET THE CONDITIONS FOR PATENTABILITY.

Appellant's brief presents arguments in this heading not related to the ground of rejections on appeal. Therefore, examiner would not rebut this the section of the argument.

(11) Related Proceeding(s) Appendix

Copies of the court or Board decision(s) identified in the Related Appeals and Interferences section of this examiner's answer are provided herein.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Ping Lee/

Primary Examiner, Art Unit 2614

Conferees:

Pwl

/Vivian Chin/

Supervisory Patent Examiner, Art Unit 2614

/CURTIS KUNTZ/

Supervisory Patent Examiner, Art Unit 2614

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